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PATENT APPLICATION
1615

Applicant : Satoshi MIKAMI et al
Title : SKIN CONTACTING ARTICLE
Serial No. : 09/341 328 Group: 1615
Confirmation No.: 4999
Filed : July 6, 1999 Examiner: Channavajjala
International Application No.: PCT/JP98/00080
International Filing Date : January 13, 1998
Atty. Docket No.: Kinoshita Case 209

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

FIRST CLASS MAILING CERTIFICATE

Sir:

I hereby certify that this correspondence is being deposited with the United States Postal Service under 37 CFR 1.8 as first class mail in an envelope addressed to: Commissioner for Patents P.O. Box 1450, Alexandria, VA 22313-1450, on February 23, 2004.


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Correspondence: Supplemental Appellants' Brief on Appeal
dated February 23, 2004
including enclosures listed thereon

190.05/03



PATENT APPLICATION

THE U.S. PATENT AND TRADEMARK OFFICE

February 23, 2004

Applicants: Satoshi MIKAMI et al

For: SKIN CONTACTING ARTICLE

Serial No.: 09/341 328

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SUPPLEMENTAL APPELLANTS' BRIEF ON APPEAL

Sir:

This is an appeal from the decision of the Examiner dated February 24, 2003, finally rejecting Claims 12-41.

In the Examiner's Answer dated January 27, 2004, the Examiner states that since Applicants have not appealed the rejection of Claims 12-41 as being unpatentable over U.S. Patent 5 776 497 to Lagrange et al, it appears that Applicants have acquiesced to this rejection. Appellants have not acquiesced to this rejection and arguments concerning Lagrange et al were omitted only due to an oversight by Appellants' representative.

According to MPEP § 1206 under the heading "APPEAL BRIEF CONTENT" it is stated that "An appellant's brief must be responsive to every ground of rejection stated by the examiner. Where an appeal brief fails to address any ground of rejection, appellant shall be notified by the examiner that he or she must correct the defect by filing a brief (in triplicate) in compliance with 37 CFR 1.192(c)." A copy of this section is enclosed herewith. In the present situation, no such notice was given to Appellant. Since Appellant has

the right to file a Supplemental Appeal Brief correcting the defect, Appellants are doing so at the present time.

REAL PARTY IN INTEREST

Idemitsu Petrochemical Co., Ltd. is the assignee of the present application and the real party in interest.

RELATED APPEALS AND INTERFERENCES

There are no related appeals and interferences to the present application.

STATUS OF CLAIMS

Claims 1-11 and 42 have been canceled. Claims 12-41 are pending and the claims under consideration on appeal.

STATUS OF AMENDMENTS

An Amendment After Final Rejection canceling Claim 42 was filed along with Appellants' Brief on Appeal.

SUMMARY OF THE INVENTION

Appellants' invention, as defined by independent Claim 12, is directed to a skin contacting article which comprises a base layer and natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin. The powder is adhered to the base layer by coating a treatment comprising the powder onto the base layer and drying the treatment thereon (specification page 5, lines 30-37 and specification page 6, lines 1-3).

Claim 13 limits Claim 12 in requiring that the skin contacting article is a sanitary article applied to the skin and comprises a surface material for directly contacting the skin, the surface material including the base layer having the natural organic and palpable powder firmly adhered thereto (specification page 2, lines 17-21).

Claim 14 limits Claim 12 in requiring that the skin contacting article is a make-up tool for applying make-up (specification page 3, line 1).

Claim 15 limits Claim 12 in requiring that the natural organic impalpable powder have an average particle size of less than 30 microns (specification page 3, lines 6 and 7).

Claim 16 limits Claim 12 in requiring that the natural organic impalpable powder have an average particle size of less than 10 microns (specification page 3, lines 11 and 12).

Appellants' invention, as defined by independent Claim 17, is directed to a skin contacting article comprising a base layer and natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin by a treatment including the natural organic impalpable powder. The treatment comprises the natural organic impalpable powder and at least one dispersion medium selected from the group consisting of water, an organic solvent, a resin emulsion and a resin aqueous solution, the powder being adhered to the base layer by coating the treatment onto the base layer and drying the treatment thereon (specification page 3, lines 18-22 and specification page 4, lines 7-9).

Claim 18 limits Claim 17 in requiring that the content ratio of the natural organic impalpable powder in the treatment be from 0.5 to 50 wt.% (specification page 4, lines 12 and 13).

Claim 19 limits Claim 17 in requiring that the dispersion medium is either the resin emulsion or the resin aqueous solution and the solid resin content in the treatment is 0.5 to 20 wt.% (specification page 4, line 18-20).

Claim 20 limits Claim 19 in requiring that the natural organic impalpable powder be firmly adhered to the base layer through the resin (specification page 4, lines 21-23).

Appellants' invention, as defined by independent Claim 21, is directed to a skin contacting article comprising a base layer and natural organic impalpable powder firmly

adhered to a side of the base layer which contacts with the skin by a treatment including the natural organic impalpable powder having an average particle size of less than 30 microns in either a resin emulsion or a resin aqueous solution for dispersing the natural organic impalpable powder. The content ratio of the natural organic impalpable powder and the treatment is from 0.5 to 50 wt.% and the solid resin content in the treatment is from 0.5 to 20 wt% with the powder being adhered to the base layer by coating the treatment onto the base layer and drying the treatment thereon (specification page 3, line 6 through specification page 4, line 20).

Claim 22 limits Claim 21 in requiring that the skin contacting article is a sanitary article applied to the skin and comprises a surface material for directly contacting the skin with the surface material including the base layer having the natural organic impalpable powder firmly adhered thereto (specification page 2, lines 29-33).

Claim 23 limits Claim 21 in requiring that the skin contacting article be a make-up tool for applying make-up.

Claim 24 limits Claim 12 in requiring that the natural organic impalpable powder is made of a material selected from the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey (specification page 2, lines 6 and 7).

Claim 25 limits Claim 24 in requiring that the material be selected from the group consisting of silk, collagen and whey (specification page 2, lines 6 and 7).

Claim 26 limits Claim 24 in requiring that the material be selected from the group consisting of chitin, chitosan and cellulose (specification page 2, lines 6 and 7).

Claim 27 limits Claim 24 in requiring that the material be selected from the group consisting of wool, hemp, cotton and sponge powder (specification page 2, lines 6 and 7).

Claim 28 limits Claim 17 in requiring that the natural organic impalpable powder be made of a material selected from

the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey (specification page 2, lines 6 and 7).

Claim 29 limits Claim 21 in requiring that the natural organic impalpable powder be made of a material selected from the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey (specification page 2, lines 6 and 7).

Claim 30 limits Claim 17 in requiring that the treatment additionally contain a surface active agent (specification page 3, lines 34 and 35).

Claim 31 limits Claim 30 in requiring that the surface active agent is an ionic surface active agent or a non-ionic surface active agent (specification page 3, lines 35-37).

Claim 32 limits Claim 30 in requiring that the surface active agent is a polyethylene oxide derivative or a sucrose fatty ester (specification page 3, line 35 through specification page 4, line 1).

Claim 33 limits Claim 17 in requiring that the treatment additionally contain a thickening agent (specification page 4, lines 2 and 3).

Claim 34 limits Claim 33 in requiring that the thickening agent is a cellulose derivative or a natural macromolecule thickening agent (specification page 4, lines 3-6).

Claim 35 limits Claim 34 in requiring that the cellulose derivative is methyl cellulose or hydroxyethyl cellulose and the natural macromolecule thickening agent is selected from the group consisting of a gum, a pectin, soda alginate, dextrin, agar and gelatin (specification page 4, lines 2-6).

Claim 36 limits Claim 21 in requiring that the treatment additionally includes a surface active agent (specification page 3, lines 34 and 35).

Claim 37 limits Claim 36 in requiring that the surface active agent is an ionic surface active agent or a non-ionic surface active agent (specification page 3, lines 35-37).

Claim 38 limits Claim 36 in requiring that the surface active agent is a polyoxyethylene derivative or a sucrose fatty ester (specification page 3, line 35 through specification page 4, line 1).

Claim 39 limits Claim 21 in requiring that the treatment additionally contains a thickening agent (specification page 4, lines 2 and 3).

Claim 40 limits Claim 39 in requiring that the thickening agent is a cellulose derivative or a natural macromolecule thickening agent (specification page 4, lines 3-6).

Claim 41 limits Claim 40 in requiring that the cellulose derivative is methyl cellulose or hydroxyethyl cellulose and the natural macromolecule thickening agent is selected from the group consisting of a gum, a pectin, soda alginate, dextrin, agar and gelatin (specification page 4, lines 3-6).

ISSUES

The first issue presented for review is whether Claims 12-41 are unpatentable under 35 USC 103(a) in view of U.S. Patent No. 5 496 544 to Mellul et al.

The second issue presented for review is whether Claims 12-41 are unpatentable under 35 USC 103(a) in view of U.S. Patent No. 5 776 497 to Lagrange et al.

GROUPING OF CLAIMS

The claims all stand or fall together.

ARGUMENT

The presently claimed invention under appeal is directed to, in its broadest form, a skin contacting article made up of a base material having a natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin. The powder is adhered to the base layer by coating a treatment comprising the powder onto the base layer and drying the treatment thereon. The natural organic powder is

provided in an impalpable form and is firmly adhered to the outer surface of the skin contacting article in order to make the article suitable for use as tissue paper, wet tissue, a mask, gauze, and sanitary articles such as disposable diapers, diaper liners and sanitary napkins. The skin contacting article can also be used as a make-up tool for the application of make-up. Since the natural organic material is provided in an impalpable powder form, it feels soothing on the skin and is less likely to cause skin irritation. It is respectfully submitted that the prior art cited by the Examiner does not disclose the presently claimed invention.

The Mellul et al reference discloses a cosmetic composition for skin consisting of anhydrous powder and mainly including a solid particulate phase mixed with a fatty binder containing a silicone mixture. This reference additionally states that the cosmetic compositions can be applied by an applicator such as a sponge, powder puff or brush. However, nothing in this reference suggests that the powder is firmly adhered to the applicator through a process of coating a treatment comprising the powder onto the base layer and drying the treatment thereon so that the cosmetic composition is firmly adhered to the base layer. Additionally, although this reference discloses that inorganic and organic pigments can be contained in the cosmetic composition, there is no disclosure in this reference of the cosmetic composition containing natural organic impalpable powder as required by the currently presented claims.

In the final rejection, the Examiner takes the position that Mellul et al reads on the present claims in that it discloses that the powdered cosmetic composition can be applied with powder puffs, applicators and sponges. Additionally, the Examiner has taken the position that Mellul et al's teaching to any organic powder reads on the natural organic impalpable powder required in the present claims.

Appellants respectfully traverse these positions of the Examiner.

Numerous court decisions have held that patent claims must be given their "accustomed", "ordinary", or dictionary meaning unless the available interpretation points to another meaning. Tate Access Floors, Inc. vs. Maxcess Technologies, Inc., 222 F3d 958, 965, 55 USPQ 2d 1513, 1517 (Fed Cir 2000) and Cortland Lime Co., Inc. vs. Orvis Co., Inc., 203 F3d 1351, 1356, 53 USPQ 2d 1734, 1737 (Fed Cir 2000). Referring to the 10th edition of Merriam Webster's Collegiate Dictionary, the definition of firmly is "securely or solidly fixed in place" and the definition of adhered is "to hold fast or stick by or as if by gluing, suction, grasping, or fusing". Therefore, giving the "accustomed", "ordinary", or dictionary meaning to the phrase "firmly adhered" means that the natural organic impalpable powder of the present invention is permanently affixed to a side of the base layer of the skin contacting article which contacts with the skin. Moreover, nothing in the present specification gives any suggestion that Appellants intend anything other than the "accustomed", "ordinary" or dictionary meaning of the phrase "firmly adhered". As such, there is no basis for the Examiner to suggest that the powder cosmetic composition of Mellul et al reads on the currently presented claims when it is contained on an applicator prior to being applied to the user.

With respect to the Examiner's position that any organic powder is a "natural organic power", Appellants respectfully submit that the Examiner is once again going against the common meaning of a word. One of ordinary skill in the art would consider the word "natural" to be an antonym of the word "synthetic". To say that any organic powder, whether made of a naturally occurring material or a synthetic organic material is a natural organic powder goes against the commonly accepted meaning of the word "natural". Moreover, although Mellul et al discloses that starch can be contained in the powder

composition of the filler, there is no disclosure in this reference that the starch is added to the filler as an organic impalpable powder. Therefore, the presently claimed invention is clearly patentably distinguishable from the Mellul et al reference.

The Lagrange et al reference discloses a mineral or organic particle-based product comprising an indoline product, a method for preparing same, and the use thereof in cosmetics. The product is powder consisting of mineral or organic particles smaller than 200 microns and comprises, and/or on the particles, an indoline product obtained by oxidative polymerization using at least one indoline. These powders are disclosed as being a cosmetic composition which are used for making up the skin and the exoskeleton and for protecting the human epidermis against UV radiation. Although this reference discloses that the inventive powder can be applied with a powder puff or brush, there is no disclosure in this reference regarding the powder being firmly adhered to a side of a base layer. As pointed out above with respect to the arguments directed to the Mellul et al reference, nothing in Lagrange et al suggests that the powder disclosed there is firmly adhered to a base layer. In fact, such an interpretation of the disclosure of Lagrange et al would in fact destroy the object of this reference since the powder disclosed there is a cosmetic preparation which is to be applied to the skin and/or exoskeleton. Therefore, for the reasons advanced above, it is respectfully submitted that the Lagrange et al reference does not disclose the presently claimed invention.

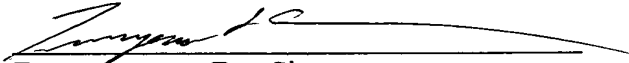
CONCLUSION

For the reasons advanced above, it is respectfully submitted that the presently claimed invention clearly is patentably distinguishable over the Mellul et al and Lagrange et al references. The only way the Mellul et al and Lagrange et al references can be considered to render the presently

claimed invention obvious is to go against the common meaning of the terms used in the present claims and accept the convoluted meaning given to these terms by the Examiner. The Examiner's rejections clearly are in error and should be reversed. Favorable consideration is respectfully solicited.

Respectfully submitted,

IN TRIPLICATE


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Encl: Appendix
MPEP Page 1206
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APPENDIX

12. A skin contacting article used in contact with the skin, said article comprising a base layer and natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin, the powder being adhered to the base layer by coating a treatment comprising the powder onto the base layer and drying the treatment thereon.

13. The skin contacting article according to Claim 12, wherein the skin contacting article is a sanitary article applied to the skin and comprises a surface material for directly contacting the skin, the surface material including the base layer having the natural organic impalpable powder firmly adhered thereto.

14. The skin contacting article according to Claim 12, wherein the skin contacting article is a make-up tool for applying make-up.

15. The skin contacting article according to Claim 12, wherein the natural organic impalpable powder has an average particle size of less than 30 μm .

16. The skin contacting article according to Claim 12, wherein the natural organic impalpable powder has an average particle size of less than 10 μm .

17. A skin contacting article used in contact with the skin, said article comprising a base layer and natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin by a treatment including the natural organic impalpable powder, the treatment comprising the natural organic impalpable powder and at least one dispersion medium selected from the group consisting of water, an organic solvent, a resin emulsion and a resin aqueous

solution, the powder being adhered to the base layer by coating the treatment onto the base layer and drying the treatment thereon.

18. The skin contacting article according to Claim 17, wherein the content ratio of the natural organic impalpable powder in the treatment is from 0.5 to 50 wt.%.

19. The skin contacting article according to Claim 17, wherein the dispersion medium is either the resin emulsion or the resin aqueous solution and the solid resin content in the treatment is 0.5 to 20 wt.%.

20. The skin contacting article according to Claim 19, wherein the natural organic impalpable powder is firmly adhered to the base layer through the resin.

21. A skin contacting article used in contact with the skin, said article comprising a base layer and natural organic impalpable powder firmly adhered to a side of the base layer which contacts with the skin by a treatment including the natural organic impalpable powder having an average particle size of less than 30 μm and either a resin emulsion or a resin aqueous solution for dispersing the natural organic impalpable powder, the content ratio of the natural organic impalpable powder in the treatment being from 0.5 to 50 wt.% and the solid resin content in the treatment being from 0.5 to 20 wt.%, the powder being adhered to the base layer by coating the treatment onto the base layer and drying the treatment thereon.

22. The skin contacting article according to Claim 21, wherein the skin contacting article is a sanitary article applied to the skin and comprises a surface material for

directly contacting the skin, the surface material including the base layer having the natural organic impalpable powder firmly adhered thereto.

23. The skin contacting article according to Claim 21, wherein the skin contacting article is a make-up tool for applying make-up.

24. The skin contacting article according to Claim 12, wherein the natural organic impalpable powder is made of a material selected from the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey.

25. The skin contacting article according to Claim 24, wherein the material is selected from the group consisting of silk, collagen and whey.

26. The skin contacting article according to Claim 24, wherein the material is selected from the group consisting of chitin, chitosan and cellulose.

27. The skin contacting article according to Claim 24, wherein the material is selected from the group consisting of wool, hemp, cotton and sponge powder.

28. The skin contacting article according to Claim 17, wherein the natural organic impalpable powder is made of a material selected from the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey.

29. The skin contacting article according to Claim 21, wherein the natural organic impalpable powder is made of a

material selected from the group consisting of silk, collagen, cellulose, chitin, chitosan, wool, hemp, cotton, sponge powder and whey.

30. The skin contacting article according to Claim 17, wherein the treatment additionally contains a surface active agent.

31. The skin contacting article according to Claim 30, wherein the surface active agent is an ionic surface active agent or a non-ionic surface active agent.

32. The skin contacting article according to Claim 30, wherein the surface active agent is a polyethylene oxide derivative or a sucrose fatty ester.

33. The skin contacting article according to Claim 17, wherein the treatment additionally contains a thickening agent.

34. The skin contacting article according to Claim 33, wherein the thickening agent is a cellulose derivative or a natural macromolecule thickening agent.

35. The skin contacting article according to Claim 34, wherein the cellulose derivative is methyl cellulose or hydroxyethyl cellulose and the natural macromolecule thickening agent is selected from the group consisting of a gum, a pectin, soda alginate, dextrin, agar and gelatin.

36. The skin contacting article according to Claim 21, wherein the treatment additionally includes a surface active agent.

37. The skin contacting article according to Claim 36, wherein the surface active agent is an ionic surface active agent or a non-ionic surface active agent.

38. The skin contacting article according to Claim 36, wherein the surface active agent is a polyoxyethylene derivative or a sucrose fatty ester.

39. The skin contacting article according to Claim 21, wherein the treatment additionally includes a thickening agent.

40. The skin contacting article according to Claim 39, wherein the thickening agent is a cellulose derivative or a natural macromolecule thickening agent.

41. The skin contacting article according to Claim 40, wherein the cellulose derivative is methyl cellulose or hydroxyethyl cellulose and the natural macromolecule thickening agent is selected from the group consisting of a gum, a pectin, soda alginate, dextrin, agar and gelatin.

corresponding to the lost count or counts will stand finally disposed of under 37 CFR 1.663.

When an application is revived after abandonment for failure on the part of the appellant to take appropriate action after final rejection, and the petition to revive was accompanied by a notice of appeal, appellant has 2 months, from the mailing date of the Commissioner's affirmative decision on the petition, in which to file the appeal brief. The time period for filing the appeal brief may be extended under 37 CFR 1.136.

With the exception of a declaration of an interference or suggestion of claims for an interference and timely copying of claims for an interference, the appeal ordinarily will be dismissed if the brief is not filed within the period provided by 37 CFR 1.192(a) or within such additional time as may be properly extended.

A brief must be filed to preserve appellant's right to the appealed claims, notwithstanding circumstances such as:

(A) the possibility or imminence of an interference involving the subject application, but not resulting in withdrawal of the final rejection prior to the brief's due date;

(B) the filing of a petition to invoke the supervisory authority of the Commissioner under 37 CFR 1.181;

(C) the filing of an amendment, even if it is one which the examiner previously has indicated may place one or more claims in condition for allowance, unless the examiner, in acting on the amendment, disposes of all issues on appeal;

(D) the receipt of a letter from the examiner stating that prosecution is suspended, without the examiner withdrawing the final rejection from which appeal has been taken or suggesting claims for an interference, and without an administrative patent judge declaring an interference with the subject application.

Although failure to file the brief within the permissible time will result in dismissal of the appeal, if any claims stand allowed, the application does not become abandoned by the dismissal, but is returned to the examiner for action on the allowed claims. See MPEP § 1215.04. If there are no allowed claims, the applica-

tion is abandoned as of the date the brief was due. Claims which have been objected to as dependent from a rejected claim do not stand allowed. In a reexamination proceeding failure to file the brief will result in the issuance of the certificate under 37 CFR 1.570.

If the time for filing a brief has passed and the application has consequently become abandoned, the applicant may petition to revive the application, as in other cases of abandonment, and to reinstate the appeal; if the appeal is dismissed, but the application is not abandoned, the petition would be to reinstate the claims and the appeal, but a showing equivalent to that in a petition to revive under 37 CFR 1.137 is required. In either event, a proper brief must be filed before the petition will be considered on its merits.

Where the dismissal of the appeal is believed to be in error, filing a petition, pointing out the error, may be sufficient.

A fee under 37 CFR 1.17(c) is required when the brief is filed. 37 CFR 1.192(a) requires the submission of three copies of the appeal brief.

APPEAL BRIEF CONTENT

The brief, as well as every other paper relating to an appeal, should indicate the number of the Technology Center (TC) to which the application or patent under reexamination is assigned and the application or reexamination control number. When the brief is received, it is forwarded to the TC where it is entered in the file, and referred to the examiner.

An appellant's brief must be responsive to every ground of rejection stated by the examiner.

Where an appeal brief fails to address any ground of rejection, appellant shall be notified by the examiner that he or she must correct the defect by filing a brief (in triplicate) in compliance with 37 CFR 1.192(c). See 37 CFR 1.192(d). Form paragraphs 12.76-12.76.06 and 12.78, or form PTOL-462, "Notification of Non-Compliance with 37 CFR 1.192(c)," may be used to notify the appellant of the deficiency. Oral argument at a hearing will not remedy such deficiency of a brief. The fact that appellant may consider a ground to be clearly improper does not justify a failure to point out to the Board the reasons for that belief.